

issuer after the opening of bids, of a prospectus relating to the securities offered at competitive bidding, unless the issuer proposes no further public offering of such securities by the issuer or by the purchasers.

(d) *Equity offerings of nonreporting small business issuers.* If a small business issuer that before the offering had no duty to file reports with the Commission under section 13(a) or 15(d) of the Exchange Act is registering equity securities for sale in an underwritten offering—The small business issuer will provide to the underwriter at the closing specified in the underwriting agreement certificates in such denominations and registered in such names as required by the underwriter to permit prompt delivery to each purchaser.

(e) *Request for acceleration of effective date.* If the small business issuer will request acceleration of the effective date of the registration statement under Rule 461 under the Securities Act, include the following:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 (the "Act") may be permitted to directors, officers and controlling persons of the small business issuer pursuant to the foregoing provisions, or otherwise, the small business issuer has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable.

In the event that a claim for indemnification against such liabilities (other than the payment by the small business issuer of expenses incurred or paid by a director, officer or controlling person of the small business issuer in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the small business issuer will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

(f) If the issuer relies on Rule 430A under the Securities Act [§ 230.430A of

this chapter], that the small business issuer will:

(1) For determining any liability under the Securities Act, treat the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the small business issuer under Rule 424(b)(1), or (4) or 497(h) under the Securities Act (§§ 230.424(b)(1), (4) or 230.497(h)) as part of this registration statement as of the time the Commission declared it effective.

(2) For determining any liability under the Securities Act, treat each post-effective amendment that contains a form of prospectus as a new registration statement for the securities offered in the registration statement, and that offering of the securities at that time as the initial bona fide offering of those securities.

[57 FR 36449, Aug. 13, 1992, as amended at 60 FR 26614, May 17, 1995]

§ 228.601 (Item 601) Exhibits.

(a) *Exhibits and index of exhibits.* (1) The exhibits required by the exhibit table generally must be filed or incorporated by reference. The Financial Data Schedule required by paragraph (b)(27) of this Item must be submitted to the Commission as provided in paragraph (c) of this Item.

(2) Each filing must have an index of exhibits. The exhibit index must list exhibits in the same order as the exhibit table. If the exhibits are incorporated by reference, this fact should be noted in the exhibit index. In the manually signed registration statement or report, the exhibit index should give the page number of each exhibit.

(3) If a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during the reporting period covered by a Form 10-QSB or Form 10-KSB, it must be filed as an exhibit to the Form 10-QSB or Form 10-KSB filed for the same period. Any amendment or modification to a previously filed exhibit to a Form 10-SB, 10-KSB or 10-QSB document must be filed as an exhibit to a Form 10-QSB

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or 10-KSB. The amendment or modification does not need to be filed if the previously filed exhibit would not be currently required.

Instructions to Item 601(a): 1. If an exhibit (other than an opinion or consent) is filed in preliminary form and is later changed to include only interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commissions, names, addresses or participation of underwriters or similar matters and the information appears elsewhere in the registration statement or a prospectus, no amendment need be filed.

2. Small business issuers may file copies of each exhibit, rather than originals, except as otherwise specifically noted.

3. *Electronic filings.* Whenever an exhibit is filed in paper pursuant to a hardship exemption (§§232.201 and 232.202 of this chapter), the letter "P" (paper) should be placed next to the exhibit in the list of exhibits required by Item 601(a)(2) of this Rule (§228.601(a)(2)). Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§232.201 or §232.202(d) of this chapter), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation "CE" (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

EXHIBIT TABLE

	Securities Act Forms					Exchange Act Forms			
	SB-2	S-2	S-3	S-4***	S-8	10-SB	8-K	10-QSB	10-KSB
(1) Underwriting agreement	x	x	x	x			x		
(2) Plan of acquisition, reorganization, arrangement, liquidation, or succession	x	x	x	x		x	x	x	x
(3) (i) Articles of incorporation	x			x		x		x	x
(ii) By-laws	x			x		x		x	x
(4) Instruments defining the rights of holders, incl. indentures	x	x	x	x	x	x	x	x	x
(5) Opinion re: legality	x	x	x	x	x				
(6) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(8) Opinion re: tax matters	x	x	x	x					
(9) Voting trust agreement	x			x		x			x
(10) Material contracts	x	x		x		x		x	x
(11) Statement re: computation of per share earnings	x	x		x		x		x	x
(12) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(13) Annual or quarterly reports, Form 10-Q *		x		x					x
(14) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(15) Letter on unaudited interim financial information	x	x	x	x	x			x	
(16) Letter on change in certifying accountant****	x	x		x		x	x		x
(17) Letter on director resignation							x		
(18) Letter on change in accounting principles								x	x
(19) Reports furnished to securityholders								x	
(20) Other documents or statements to securityholders							x		
(21) Subsidiaries of the registrant	x			x		x			x
(22) Published report regarding matters submitted to vote								x	x
(23) Consent of experts and counsel	x	x	x	x	x		x**	x**	x**
(24) Power of attorney	x	x	x	x	x	x	x	x	x
(25) Statement of eligibility of trustee	x	x	x	x					
(26) Invitations for competitive bids	x	x	x	x					
(27) Financial Data Schedule*****	x	x	x	x		x	x	x	x
(28) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(29) through (98) [Reserved]									
(99) Additional Exhibits	x	x	x	x	x	x	x	x	x

* Only if incorporated by reference into a prospectus and delivered to holders along with the prospectus as permitted by the registration statement; or in the case of a Form 10-KSB, where the annual report is incorporated by reference into the text of the Form 10-KSB.

** Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

*** An issuer need not provide an exhibit if: (1) an election was made under Form S-4 to provide S-2 or S-3 disclosure; and (2) the form selected (S-2 or S-3) would not require the company to provide the exhibit.

**** If required under Item 304 of Regulation S-B.

***** Financial Data Schedules shall be filed by electronic filers only. Such schedule shall be filed only when a filing includes annual and/or interim financial statements that have not been previously included in a filing with the Commission. See Item 601(c) of Regulation S-B.

(b) *Description of exhibits.* Below is a description of each document listed in the exhibit table.

(1) *Underwriting agreement.* Each agreement with a principal underwriter for the distribution of the securities. If the terms have been determined and the securities are to be registered on Form S-3 (§ 239.13), the agreement may be filed on Form 8-K (§ 249.308) after the

effectiveness of the registration statement.

(2) *Plan of purchase, sale, reorganization, arrangement, liquidation or succession.* Any such plan described in the filing. Schedules or attachments may be omitted if they are listed in the index and provided to the Commission upon request.

(3) *Articles of incorporation and by-laws.* (i) A complete copy of the articles of incorporation. Whenever amendments to articles of incorporation are filed, a complete copy of the articles as amended shall be filed.

(ii) A complete copy of the by-laws. Whenever amendments to the by-laws are filed, a complete copy of the by-laws as amended shall be filed.

(4) *Instruments defining the rights of security holders, including indentures.* (i) All instruments that define the rights of holders of the equity or debt securities that the issuer is registering, including the pages from the articles of incorporation or by-laws that define those rights.

(ii) All instruments defining the rights of holders of long term debt unless the total amount of debt covered by the instrument does not exceed 10% of the total assets of the small business issuer.

(iii) Copies of indentures to be qualified under the Trust Indenture Act of 1939 shall include an itemized table of contents and a cross reference sheet showing the location of the provisions inserted in accordance with Sections 310 through 318(a) of that Act.

Instruction to Item 601(b)(4)(iii) for electronic filings. If the instrument defining the rights of security holders is in the form of a certificate, the text appearing on the certificate shall be reproduced in an electronic filing together with a description of any other graphic and image material appearing on the certificate, as provided in Rule 304 of Regulation S-T (§232.304 of this chapter).

(5) *Opinion on legality.* (i) An opinion of counsel on the legality of the securities being registered stating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the small business issuer.

(ii) If the securities being registered are issued under a plan that is subject to the requirements of ERISA furnish either:

(A) An opinion of counsel which confirms compliance with ERISA; or

(B) A copy of the Internal Revenue Service determination letter that the plan is qualified under section 401 of the Internal Revenue Code.

If the plan is later amended, the small business issuer must have the opinion of counsel and the IRS determination letter updated to confirm compliance and qualification.

(6) No Exhibit Required.

(7) [Reserved]

(8) *Opinion on tax matters.* If tax consequences of the transaction are material to an investor, an opinion of counsel, an independent public or certified public accountant or, a revenue ruling from the Internal Revenue Service, supporting the tax matters and consequences to the shareholders. The exhibit is required for filings to which Securities Act Industry Guide 5 applies.

(9) *Voting trust agreement and amendments.*

(10) *Material contracts.* (i) Every material contract, not made in the ordinary course of business, that will be performed after the filing of the registration statement or report or was entered into not more than two years before such filing. Also include the following contracts:

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

(B) Any contract upon which the small business issuer's business is substantially dependent, such as contracts with principal customers, principal suppliers, franchise agreements, etc.;

(C) Any contract for the purchase or sale of any property, plant or equipment for a consideration exceeding 15 percent of such assets of the small business issuer; or

(D) Any material lease under which a part of the property described in the registration statement or report is held by the small business issuer.

(ii)(A) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any

director or any of the named executive officers of the registrant as defined by Item 402(a)(2) (§228.402(a)(2)) participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.

(B) Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the small business issuer) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a small business issuer in connection with a merger, consolidation or other acquisition transaction pursuant to which the small business issuer may make further grants or awards of its equity securities shall be considered a compensation plan of the small business issuer for purposes of the preceding sentence.

(C) The following management contracts or compensatory plans need not be filed:

(1) Ordinary purchase and sales agency agreements;

(2) Agreements with managers of stores in a chain organization or similar organization;

(3) Contracts providing for labor or salesmen's bonuses or payments to a class of security holders, as such;

(4) Any compensatory plan which is available to employees, officers or directors generally and provides for the same method of allocation of benefits between management and nonmanagement participants; and

(5) Any compensatory plan if the issuer is a wholly owned subsidiary of a reporting company and is filing a report on Form 10-KSB (§249.310b), or registering debt or non-voting preferred stock on Form S-2 (§239.12).

Instruction 1 to Item 601(b)(10): Only copies of the various remunerative plans need be filed. Each individual director's or executive offi-

cer's personal agreement under the plans need not be filed, unless they contain material provisions.

Instruction 2 to Item 601(b)(10): If a material contract is executed or becomes effective during the reporting period reflected by a Form 10-QSB or Form 10-KSB, it shall be filed as an exhibit to the Form 10-QSB or Form 10-KSB filed for the corresponding period. See paragraph (a)(3) of this Item. With respect to quarterly reports on Form 10-QSB, only those contracts executed or becoming effective during the most recent period reflected in the report shall be filed.

(11) *Statement re computation of per share earnings.* An explanation of the computation of per share earnings on both a primary and fully diluted basis unless the computation can be clearly determined from the registration statement or report.

(12) No exhibit required.

(13)(i) Annual report to security holders for the last fiscal year, Form 10-Q or 10-QSB or quarterly report to security holders, if incorporated by reference in the filing. Such reports, except for the parts which are expressly incorporated by reference in the filing are not deemed "filed" as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed in one copy. See Rule 411(b) (§230.411(b) of this chapter).

(ii) If the annual or quarterly report to security holders is incorporated by reference in whole or in part into an electronic filing, whatever is so incorporated must be filed in electronic format as an exhibit to the filing.

(14) *Code of ethics.* Any code of ethics, or amendment thereto, that is the subject of the disclosure required by Item 406 of Regulation S-B (§228.406) or Item 10 of Form 8-K (§249.308 of this chapter), to the extent that the small business issuer intends to satisfy the Item 406 or Item 10 requirements through filing of an exhibit.

(15) *Letter on unaudited interim financial information.* A letter, where applicable, from the independent accountant which acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information. The letter is not considered a part of a registration statement prepared or certified by an accountant

or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Securities Act. Such letter may be filed with the registration statement, an amendment thereto, or a report on Form 10-QSB (§249.308b) which is incorporated by reference into the registration statement.

(16) *Letter on change in certifying accountant.* File the letter required by Item 304(a)(3).

(17) *Letter on director resignation.* Any letter from a former director which describes a disagreement with the small business issuer that led to the director's resignation or refusal to stand for re-election and which requests that the matter be disclosed.

(18) *Letter on change in accounting principles.* Unless previously filed, a letter from the issuer's accountant stating whether any change in accounting principles or practices followed by the issuer, or any change in the method of applying any such accounting principles or practices, which affected the financial statements being filed with the Commission in the report or which is expected to affect the financial statements of future fiscal years is to an alternative principle which in his judgment is preferable under the circumstances. No such letter need be filed when such change is made in response to a standard adopted by the Financial Accounting Standards Board that creates a new accounting principle, that expresses a preference for an accounting principle, or that rejects a specific accounting principle.

(19) *Report furnished to security holders.* If the issuer makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of Form 10-Q or 10-QSB, the information called for may be incorporated by reference to such published document or statement provided copies thereof are included as an exhibit to the registration statement or to Part I of the Form 10-Q or 10-QSB report.

(20) Other documents or statements to security holders or any document incorporated by reference.

(21) *Subsidiaries of the small business issuer.* A list of all subsidiaries, the

state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business.

(22) *Published report regarding matters submitted to vote of security holders.* Published reports containing all of the information called for by Item 4 of Part II of Form 10-Q (or 10-QSB) or Item 4 of Part I of Form 10-K or 10-KSB which is referred to therein in lieu of providing disclosure in Form 10-Q (10-QSB) or 10-K (10-KSB), which are required to be filed as exhibits by Rule 12b-23(a)(3) under the Exchange Act.

(23) *Consents of experts and counsel.* (i) Securities Act filings—Dated and manually signed written consents or a reference in the index to the location of the consent.

(ii) Exchange Act reports. If required to file a consent for material incorporated by reference in a previously filed registration statement under the Securities Act, the dated and manually signed consent to the material incorporated by reference. The consents shall be dated and manually signed.

(24) *Power of attorney.* If a person signs a registration statement or report under a power of attorney, a manually signed copy of such power of attorney or if located elsewhere in the registration statement, a reference in the index to where it is located. In addition, if an officer signs a registration statement for the small business issuer by a power of attorney, a certified copy of a resolution of the board of directors authorizing such signature. A power of attorney that is filed with the Commission must relate to a specific filing or an amendment, provided, however, that a power of attorney relating to a registration statement under the Securities Act or an amendment thereto also may relate to any registration statement for the same offering that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§230.462(b) of this chapter. A power of attorney that confers general authority must not be filed with the Commission.

(25) *Statement of eligibility of trustee.* (i) Form T-1 (§269.1 of this chapter) if an indenture is being qualified under the Trust Indenture Act, bound separately from the other exhibits.

(ii) The requirement to bind separately the statement of eligibility and qualification does not apply to statements submitted in electronic format. Rather, such statements must be submitted as exhibits in the same electronic submission as the registration statement to which they relate, or in an amendment thereto, except that electronic filers that rely on Trust Indenture Act Section 305(b)(2) for determining the eligibility of the trustee under indentures for securities to be issued, offered or sold on a delayed basis by or on behalf of the registrant shall file such statements separately in the manner prescribed by § 260.5b-1 through § 260.5b-3 of this chapter and by the EDGAR Filer Manual.

(26) *Invitations for competitive bids.* If the registration statement covers securities that the small business issuer is offering at competitive bidding, any invitation for competitive bid that the small business issuer will send or give to any person shall be filed.

(27) through (98) [Reserved]

(99) *Additional exhibits.* (i) Any additional exhibits if listed and described in the exhibit index.

(ii) If pursuant to Section 11(a) of the Securities Act (15 U.S.C. 77k(a)) an issuer makes generally available to its security holders an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement, and if such earnings statement is made available by "other methods" than those specified in paragraphs (a) or (b) of § 230.158 of this chapter, it must be filed as an exhibit to the Form 10-QSB or the Form 10-KSB, as appropriate, covering the period in which the earnings statement was released.

[57 FR 36449, Aug. 13, 1992, as amended at 57 FR 48150, Oct. 21, 1992; 58 FR 14660, Mar. 18, 1993; 58 FR 21349, Apr. 21, 1993; 58 FR 26383, May 3, 1993; 58 FR 27469, May 10, 1993; 59 FR 36260, July 15, 1994; 59 FR 67759, Dec. 30, 1994; 60 FR 26614, May 17, 1995; 61 FR 24654, May 15, 1996; 61 FR 30401, June 14, 1996; 62 FR 36455, July 8, 1997; 65 FR 24799, Apr. 27, 2000; 67 FR 246, Jan. 2, 2002]

EDITORIAL NOTES: 1. At 65 FR 24799, Apr. 27, 2000, in § 228.601, paragraph (a), the table was amended by removing the entries for exhibits (27) and (28) and footnote ****. However, this is a photographed table; thus the entries could not be removed.

2. At 68 FR 5126, Jan. 31, 2003, § 268.601 was amended by removing the "reserved" designation for exhibit (14) and adding "Code of ethics" in its place in the Exhibit Table, by removing "N/A" corresponding to exhibit (14) under all captions in the Exhibit Table, and by adding an "X" corresponding to exhibit (14) under the caption "Exchange Act Forms", "8-K" and "10-KSB" in the Exhibit Table. However, this is a photographed table; thus these amendments could not be incorporated.

§ 228.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.

Give the following information for all securities that the small business issuer sold within the past three years without registering the securities under the Securities Act.

(a) The date, title and amount of securities sold.

(b) Give the names of the principal underwriters, if any. If the small business issuer did not publicly offer any securities, identify the persons or class of persons to whom the small business issuer sold the securities.

(c) For securities sold for cash, the total offering price and the total underwriting discounts or commissions. For securities sold other than for cash, describe the transaction and the type and amount of consideration received by the small business issuer.

(d) The section of the Securities Act or the rule of the Commission under which the small business issuer claimed exemption from registration and the facts relied upon to make the exemption available.

(e) If the information called for by this paragraph (e) is being presented on Form 8-K, Form 10-QSB, Form 10-Q, Form 10-KSB or Form 10-K (§§ 249.308, 249.308b, 249.308a, 249.310b or 249.310) under the Exchange Act, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

(f) As required by § 230.463 of this chapter, following the effective date of the first registration statement filed under the Securities Act by an issuer, the issuer or successor issuer shall report the use of proceeds on its first